THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on : 19.04.2007

+ **CRL.REV.P.714/2004**

MUJAHID ALI & OTHERS ... Petitioners

- versus -

THE STATE (NCT OF DELHI) ... Respondent

Advocates who appeared in this case:
For the Petitioners : Mr R.N. Mittal, Sr Advocate with Mr Pawan Kumar Mittal.
Respondent/State : Ms Richa Kapoor.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? YES

2. To be referred to the Reporter or not? YES

3. Whether the judgment should be reported in Digest? YES

BADAR DURREZ AHMED, J

1. This is an unfortunate case of sons assaulting their father. The petitioners have been convicted under Sections 323/34 IPC on the basis of a complaint by their father Rashid Ali for having assaulted him.

2. The judgment and order dated 26.10.2004 passed by the learned Additional Sessions Judge, New Delhi in Criminal Appeal No.14/2004 is impugned in this revision petition. By the impugned order dated 26.10.2004, the petitioners' appeal, against the order of conviction dated 22.2.2003 and order on sentence also dated 22.2.2003 passed by the learned Metropolitan

Magistrate, was dismissed. The learned Metropolitan Magistrate had convicted the petitioners for offences under Sections 323/34 IPC but, after having noted the circumstance that the accused were the sons and the complainant was the father and that the latter had grown quite old and had acquired a quarrelsome personality and that no similar incident had occurred again, thought it fit not to send the petitioners to jail and directed the release on probation of good behaviour for a period of six months on furnishing personal bonds / surety bonds in the sum of Rs.5000/- each. Apart from this, the petitioners were directed to pay compensation in the sum of Rs.2000/- to the complainant.

3. The brief facts, as indicated in the impugned order, are that the complainant (Rashid Ali) resided at House No. 36-A, Zakir Nagar, Gali No.21, Okhla. He had strained relations with his sons, namely, Shakir Ali, Mujahid Ali, Sharik and Mushahid Ali. All of them lived in the same house but separate from their father i.e., the complainant. On 09.07.1993 at about 11.30 p.m. all his sons are alleged to have given a beating to the complainant mercilessly but he did not make any complaint to the police as he was not in a condition to go to the police station. According to the complainant, his said sons gave him a beating at the instance of his wife Mrs Mehar Jahan. Apparently the police received a DD No.42 at 12.27 a.m. on 10.07.1993. The complainant was sent to All India Institute of Medical Sciences where he was medically examined. As per the X-ray report there was a fracture on the right wrist of the complainant. Thereafter the case was investigated. A charge sheet was filed

against the accused. However, charges were framed only against the sons i.e.,. Shakir Ali, Mujahid Ali, Sharik and Mushahid Ali. Mrs Mehar Jahan was discharged.

4. To prove its case, the prosecution examined PW1 S.I. B.S. Khatana who proved the FIR No.428/1993 dated 29.7.1993 under Sections 324/34/120B IPC at Police Station Sriniwas Puri (Exhibit PW1/A). PW2 (Suresh Kumar) proved the MLC (Exhibit PW2/A). The complainant Rashid Ali was examined as PW3. Apart from this, the defence examined DW1 (Jasmine) who was the sister of the petitioners and the daughter of the complainant (Rashid Ali). According to DW1, no such incident had taken place and the complainant had fallen somewhere due to which he got injuries on his hand.

5. After examining the aforesaid evidence, the learned Metropolitan Magistrate, by the said order dated 09.07.1993, convicted Mujahid Ali, Sharik and Mushahid Ali under Section 323/34 IPC and acquitted Shakir Ali. The sentence awarded was as already indicated above.

6. Before the learned Additional Sessions Judge, the petitioners had essentially taken two points. The first point that was urged on their behalf was the question of delay of about 20 days in the registration of the case. The second point that was urged on behalf of the petitioners before the learned Additional Sessions Judge was that there was material contradiction in the

statement of PW3 (Rashid Ali) made in court and his statement recorded by the police under section 161 of the Code of Criminal Procedure, 1973.

7. The learned Additional Sessions Judge carefully examined both these contentions. After referring to the decision of the Supreme Court in the case of ***Tara Singh v State of Punjab : 1991 (1) CC Cases 142***, the learned Additional Sessions Judge concluded that a delay in recording of the FIR by itself cannot be a ground to dispel the prosecution case unless there are indications of fabrication. In this context, the learned Additional Sessions Judge held that mere delay would not be fatal to the prosecution case as it has been explained by the injured that during this period he was in hospital. The learned Additional Sessions Judge also noted that the injuries were caused on the person of the complainant (Rashid Ali) by his sons. Even his daughter has appeared as a defence witness (DW1) against him. These factors, according to the learned Additional Sessions Judge, showed that there was nobody to look after the complainant and generally outsiders did not intervene in family disputes. Therefore, he concluded that the delay in the case was not fatal to the prosecution case. As regards the allegation of material contradiction in the statement of PW3 made before court and his statement recorded by the police under Section 161 Cr.P.C. , the learned Additional Sessions Judge came to the conclusion that minor contradictions would not disprove the prosecution case, particularly, as the injuries were caused in July, 1993 whereas the complainant was examined as a witness in April, 2001 after about 8 years of the incident.

The learned Additional Sessions Judge also took note of the fact that the witness (PW3) was an old person. He also noted that in cross examination of PW3, no suggestion had been given to him as to the manner in which he received injuries and that the version given by his daughter Jasmine (DW1) was an after thought. Accordingly, the learned Additional Sessions Judge concluded that there was no illegality in the order of conviction passed by the learned Metropolitan Magistrate and as such dismissed the appeal maintaining the conviction as well as the order on sentence.

8. Before this court, Mr Mittal, the learned senior counsel appearing on behalf of the petitioners raised similar contentions, though in somewhat greater detail. He submitted that only three witnesses were examined by the prosecution and that the investigating officer was not examined. He submitted that PW2 who allegedly proved the MLC did not identify the signature of the doctor. Mr Mittal referred to the MLC (Exhibit PW2-A) and compared it with the statements made by the complainant (PW3) in an attempt to show that there were contradictions with regard to the nature of injuries. Mr Mittal also referred to the FIR wherein it was allegedly stated by the complainant (Rashid Ali) that his sons had assaulted him. It was alleged that Mujahid Ali hit him with a knife. Mushahid Ali and Shakir Ali gave danda and fist blows and Sharik Ali also assaulted him. Mr Mittal tried to make a point by saying that while Shakir Ali was acquitted, why was Mushahid Ali not acquitted as both were alleged to have given *danda* and fist blows. Mr Mittal also referred to the

cross examination of PW3 wherein PW3 stated that before the police he had mentioned the weapon as "*dasta of fawra"* whereas the police wrote it as a "danda". He submitted that Rashid Ali in his deposition had stated that Shakir Ali had saved him whereas elsewhere in the statement he said that his sons, which included Shakir Ali, assaulted him. Mr Mittal submitted that on the basis of the statement of PW3 that Shakir Ali had saved him, Shakir Ali has been acquitted. Therefore, Mr Mittal submitted that this part of the testimony of PW3 was believed for the purposes of acquittal but the other part was disbelieved where he mentioned that Shakir Ali was party to the assault. According to him, conviction on the sole testimony of PW3 which was partly believed and partly disbelieved ought not to have been done.

9. In sum and substance, Mr Mittal submitted that the sole testimony of PW3 ought not to be believed. This is so because the FIR itself was delayed by about 20 days. There are contradictions in the FIR and the statement made by PW3 in court. The prosecution's story is partly discarded and the benefit would have to go to the accused. That the MLC itself was not proved as the signature of the doctor was not identified and assuming that the MLC was proved, it contradicts the statement made by PW3. The non- production of the investigating officer would also inure to the benefit of the accused. He also submitted that DD No.42 was not on record and the site plan was not proved. Taking into account all these factors, he submitted with reference to the following decisions ***Thana Ram v State of Haryana*** ***: 1996 CRI. L. J. 2020;***

Chuhar Singh v State of Haryana *: 1976 SCC (Cri) 215;* ***Sudhir & Another v State of Madhya Pradesh*** *: 1985 SCC (Cri) 123* and ***Namwar Dubey & Others v State of U.P.*** *: 1995 SCC (Cri) 1106* that the petitioners deserve acquittal and the impugned order ought to be set aside.

10. Ms Richa Kapoor, who appears on behalf of the State, submitted that on 09.07.1993 at about 11.30 p.m. in the house of the accused and the complainant an incident had occurred. The complainant had been taken to hospital by the constable after about two hours. The MLC indicates the time of arrival as 1:48 a.m. on 10.07.1993. It was alleged that he was involved in a fight and was beaten with iron rods and a knife. The treatment prescribed was plaster cast on the arm and he was referred to the Orthopedic surgeon. The FIR was recorded on 29.7.1993 but it did mention the DD No.42 which had already been received in the police station on 10.07.1993.

11. She referred to a decision in the case of ***Bharwada Bhoginbhai Hirjibhai v State of Gujarat*** *: (1983) 3 SCC 217* which, although related to a Special Leave Petition before the Supreme Court would, according to her, also apply to a revision petition in respect of concurrent findings of fact recorded by the lower courts. In that decision, the Supreme Court had observed that a concurrent finding of fact cannot be reopened in an appeal by a special leave unless the finding is based on no evidence or that the finding is perverse or the finding is based and built on inadmissible evidence. She submitted that the same principle would apply for entertaining a revision petition in respect of

concurrent finding of fact recorded by the trial court as well as the appellate court. She submits that unless the findings are based on no evidence at all or that the finding is perverse to such an extent that no reasonable person could have arrived at the same even if the evidence is taken at its face value or that the case was built entirely on inadmissible evidence, the order of conviction ought not to be disturbed by this court in exercise of its revisional jurisdiction.

12. With respect to the submissions that there was delay in recording of the FIR, she submitted that the delay was not on the part of the complainant (Rashid Ali) but on the part of the police. The DD No.42 dated 10.07.1993 which was recorded on the very next day was mentioned in the FIR. This has also been mentioned in the statement of PW1 who proved the FIR. The fact that the petitioner was examined at All India Institute of Medical Sciences on 10.07.1993 was also recorded in the FIR. Therefore, according to her, the delay in registering the FIR would not be fatal to the prosecution case.

13. With regard to the non-examining of the investigating officer, she referred to the decision of the Supreme Court in the case of ***Narendra Nath Khaware v Parasnath Khaware : (2003) 5 SCC 488*** to submit that non-examination of the investigating officer by itself is not fatal to the prosecution case. With regard to the alleged contradictions between the statement of PW3 made before court and that recorded before the police, she submitted that there was a minor contradiction with regard to the situs of the injuries but the MLC clearly indicated that the petitioner did suffer injuries. His right hand was

fractured and was put in a plaster cast. The defence witness had suggested that the injuries were received by the complainant in the course of a fall. But, Ms Richa Kapoor submitted that the injuries received by the complainant were not consistent with a fall and the MLC did not disclose that the complainant was in a drunken state.

14. The above resume of facts and circumstances and the arguments advanced by the counsel for the parties clearly indicates that the arguments sought to be advanced before this court on behalf of the accused were also taken before the learned Additional Sessions Judge. What the petitioners are seeking to do is to require this court to re-examine the findings of fact and to upset the same. The question of delay has been satisfactorily explained by the arguments of Ms Richa Kapoor. With regard to the alleged contradictions in the statement of PW3 before the court and before the police one must not forget that the appellate court had clearly noted that there was a time gap of about 8 years in the recording of the same. The contradictions were not of a major kind and there was nothing to detract from the position that the complainant (Rashid Ali) had, in fact, been injured and suffered the fracture.

15. The Supreme Court in ***State of Maharashtra v Jagmohan Singh Kuldip Singh Anand*** : ***(2004) 7 SCC 659*** held that in exercise of its revisional power under Sections 397/401 of the Code, the High Court ought not to act as a second appellate court and undertake an in-depth and minute re-examination of the entire evidence and thereafter upset concurrent findings of the trial court

and the first appellate court. The Supreme Court cautioned that the High Court is required to exercise self-restraint in a revision petition. In ***Bindeshwari Prasad Singh v State of Bihar (2002) 6 SCC 650***, the Supreme Court held that in the absence of any manifest illegality, perversity and miscarriage of justice, the High Court in exercise of its revisional jurisdiction ought not to interfere with the concurrent findings of fact.

16. Considering the facts and circumstances of the case, in the light of the legal position with regard to the scope of exercise of revisional power by the High Court, I am of the view that since this is not a case where conviction has been based on no evidence nor is it a case in which the findings can be said to be perverse or based on inadmissible evidence and there does not appear to be any manifest, illegality, perversity and miscarriage of justice, re-examination of the entire evidence is not warranted. Since the concurrent findings ought not to be interfered with in such a circumstance, there is no question of any interference with the impugned order.

17. The revision petition is dismissed.

BADAR DURREZ AHMED
(JUDGE)

April 19, 2007
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